ISMANDI LABOT

v.

SURUHANJAYA PERKHIDMATAN AWAM NEGERI SARAWAK & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG JC
[JUDICIAL REVIEW NO: JR-4-2010-I]
26 MAY 2010

ADMINISTRATIVE LAW: *Judicial review - Dismissal order - Whether wrongful deduction of salaries - Whether breach of r. 35(2) Public Service Commission Rules 1996 (Sarawak) - Whether breach of natural justice*

PUBLIC SERVANTS: *Dismissal - Dismissal of administrative assistant - Judicial review - Whether wrongful deduction of salaries - Whether breach of r. 35(2) Public Service Commission Rules 1996 - Whether breach of natural justice - Public Service Commission Rules 1996 (Sarawak), r. 35(2) - General Orders, GO 171(4)*

The applicant was an administrative assistant with the Land and Surveys Department (the 2nd respondent) and was dismissed for absence from duty without permission and reasonable cause. He applied for *certiorari* to quash his dismissal order and a *mandamus* to direct the four respondents herein to reinstate him back to his former post with back wages and all other entitlements thereto. The applicant claimed that (1) there was a wrongful deduction of his salaries for the months of October and November 2007; (2) there was a breach of r. 35(2) of the Public Service Commission Rules 1996 (Sarawak) in that he was not granted a hearing before the Disciplinary Board; and (3) there was a breach of natural justice.

Held (allowing application in part):

(1) The applicant was not totally absent in the said two months. The total stoppage of the applicant's salaries for October and November were against GO. 171(4) of the State Public Service General Orders 1996 (Sarawak). He was therefore entitled for the payment in full of his salary for both the months, minus the eight days that he was absent. (para 11)

(2) The provision on the holding of a hearing before a Board of Inquiry was couched with the word 'may'. It was therefore not mandatory to hold a hearing before the Disciplinary Board – but if a hearing was set up, it was mandatory to give the accused officer the right to cross-examine the witnesses called by his employer. In the present case, there was no miscarriage of justice as the applicant had been given the right to make a written representation in answer to the charge levelled against him. (paras 19 & 20)

(3) The delay of one year for the 1st respondent to come out with its decision did not result in procedural unfairness in the disciplinary action taken against the applicant despite no reasons being given. As the applicant himself chose not to go to work, it was not shown how his position was adversely affected by the delay. Further, the delay of one year was not an inordinately long time. The delay also could not be construed that his employer, the 2nd respondent, had condoned his misconduct. His absence from work was his call and not the 2nd respondent's. The court would only act if the delay had caused injustice. (paras 22-24)

[Applicant's dismissal for absence from work from 3 December 2007 until 14 February 2008 was affirmed. Salary for months of October and November 2007 to be paid minus days he was absent.]

Case(s) referred to:

Ganasan Marimuthu v. Public Services Commission & Anor [1998] 4 CLJ 331 CA ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC ***(refd)***

Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(refd)***

Legislation referred to:

Public Officers (Conduct and Discipline) (Chapter D) Regulations 1969, regs. 26, 27, 30

Public Service Commission Rules 1996 (LN 14/96) (Sarawak), rr. 33, 34(1), 35(1), (2)

State Public Service General Orders 1996 (Sarawak), O. 153(4)(j), O. 171(1), (4)

For the applicant - Bong Ah Loi; M/s Suhaili & Bong Advocs

For the respondents - Saferi Ali; AG's Chambers

Reported by Usha Thiagarajah

JUDGMENT

Rhodzariah Bujang JC:

[1] The applicant was employed an Administrative Assistant Grade N17 with Lands & Surveys Department, Betong Division when he was found guilty of and dismissed by the 1st respondent *vide* a letter dated 5 January 2010, for being absent from duty without permission and reasonable cause. Order 153(4)(j) of the State Service General Orders 1996 ("General Orders") stipulates that an officer shall not be so absent from duty and if he does, under O. 171(1) of the said General Orders, he is then liable to disciplinary action.

[2] The applicant has taken this application for a *certiorari* to quash the order of his dismissal and a *mandamus* to direct the four respondents to reinstate him back to his former post with back wages and all other entitlements thereto with effect from October 2007.

[3] In his affidavit in support of the application, the applicant said his salary for the month of October 2007 was suddenly stopped eventhough there was a directive in writing by the then Superintendent of Lands & Surveys Betong, Mdm Peggy Ronin, to withdraw the minute directing stoppage of his salary after he had successfully explained to her that he was only absent for one day (on sick leave) in the said month and not six days (26 September 2007, 27 September 2007, 5 October 2007, 8 October 2007, 9 October 2007 and 10 October 2007) as alleged in the show cause letter of Mr. Mohd Akbar bin Sahmoni dated 16 October 2009.

[4] The applicant had he replied to the show cause letter and despite the withdrawal of the directive on the stoppage of his salary, he discovered that his November salary was also stopped. When he was ordered out of Mdm Peggy Ronin's Office after failing to get a clarification from her on his salary, he did not return to work until the dismissal letter came.

[5] In respect of the disciplinary proceeding held by the 1st respondent – he had replied as requested in the 1st respondent's show cause letter dated 26 August 2008 (which contained the charge against him) and his written representation dated 20 October 2008 was received by the 1st respondent.

[6] He had further attended the Lands & Surveys Department's Board of Investigation held on 30 January 2009 in which he claimed he was only interviewed after the Board had interviewed the other witnesses in his absence. The applicant further disputed the constitution of the Board which he said consisted of officers who had close working relationship with Mdm Peggy Ronin. He also contended that the decision to terminate his service was not made within a reasonable time seeing how the letter of termination was only dated 5 January 2010 when the show cause letter from the 1st respondent was dated 26 August 2008 and the Board of Investigation of the Department had sat on 30 January 2009.

[7] The applicant is challenging his dismissal and termination from service on the grounds of:

(i) wrongful deduction of his salaries; and

(ii) wrong procedure for dismissal and breach of natural justice.

Wrongful Deduction Of Salaries In October And November

[8] In respect of this issue, I note that Mdm Peggy Ronin whom the applicant alleged had minuted on the department's show cause letter dated 10 October 2007 to stop his salary and then withdrawing the same, giving him one month to improve himself, did not file any affidavit evidence to refute what he has alleged. Infact the two affidavits filed by the respondents did not address this allegation either. Further, in the 1st respondent's show cause letter to him dated 26 August 2008 (exh. A6 to the applicant's affidavit) the dates he was alleged to have been absent from work is exhibited as Annexure A. For October 2007 – it was 5 days and November 2007 – it was eight days.

[9] Therefore, even from the respondents' own case, the applicant was not totally absent in the said two months and for the month of October, I accept his contention which was not refuted by Mdm Peggy Ronin that the instruction to stop his salary had been withdrawn. The applicant had also provided a sick leave certificate for 'red eyes' for a day he was absent in October (5 October 2007) and I reiterate what I said earlier that the respondents did not rebut his allegation that Mdm Peggy Ronin had forgiven him and gave him a second chance.

[10] Order 171(4) of the General Orders stipulates that an officer who had been found guilty of being absent from duty without leave, permission or reasonable cause shall not be entitled to be paid "any emolument **for the period during which he is absent from duty** …". (emphasis added).

[11] It is therefore clear from this provision that the total stoppage of the applicant's salaries for October and November were against the General Orders. He is therefore entitled for the payment in full of his salary in October 2007 and for November 2007, minus the eight days in which he was absent.

Wrongful Dismissal And Breach Of Natural Justice

[12] Mr. Bong Ah Loi submitted that there was a clear breach of r. 35(2) of the Public Service Commission Rules 1996 in terminating the applicant's employment. To appreciate his argument, let me just summarize the procedure for a disciplinary action before and by the Commission. Before I do so, I would make a brief remark that the procedures under these Rules are in *pari materia* with that as provided under regs. 26-27 and 30 of the Public Officers (Conduct and Discipline) (Chapter D) Regulations 1969 applicable to public officers serving the Federal Government.

[13] The state procedure starts with r. 33 which requires the Head of Department to report to the Commission through the State Secretary (who is to make his own report to the Commission) of the misconduct or breach of discipline of his subordinate officer such as warranting the dismissal or reduction in rank of the said officer. Upon receipt of the report, the Commission is to make its own preliminary investigation in order to obtain better particulars or evidence of the alleged misconduct or breach of discipline.

[14] Then under r. 34(1), if the Commission is of the view that a case has been made out against the said officer, which is unrebutted, they would then forward the charge to him and ask him to make a representation in writing in answer to the charge as framed. The time limited to do so under the rule is not less than 21 days.

[15] There is evidence, both direct and by implication that these had been done in this case. I said 'by implication' because the report of the applicant's head of department was not exhibited in any of the affidavit but the letter containing the charge against him and asking for the representation was (exh. A6 to the applicant's affidavit).

[16] Then under r. 34(2), if the Commission considers that the punishment which they intend to impose is dismissal or reduction in rank, the Commission '**may** subject to r. 35(11) grant the accused officer a hearing before a Disciplinary Board under r. 35(1)' (emphasis added).

[17] Under r. 35(1), the phrase above is more less repeated when it provides that 'the Commission may grant the accused officer a hearing before a Disciplinary Board'. Pursuant to r. 35(2) at the hearing before the Disciplinary Board, which the said officer must attend, he shall be permitted to,

(a) to cross-examine the witnesses;

(b) to give evidence on his own behalf;

(c) to have such witnesses as he may wish called on his behalf; and

(d) to have access to information contained in any documents at a reasonable time before the documents are tendered in evidence.

[18] Mr. Bong Ah Loi submitted that there was no such disciplinary board hearing in this case – only a Board of Investigation hearing held on 30 January 2009 set up internally by the 3rd respondent and for which the applicant was not allowed to cross-examine the witnesses called before the said Board.

[19] As I have highlighted above, the provision on the holding of a hearing before a Board of Inquiry is couched with the word 'may'. It is therefore not mandatory to set up one and to hold a hearing before them but if it is set up, then it is mandatory to give the accused officer the right to cross-examine the witnesses called by his employer. The position is the same for public officers serving the Federal Government for this was stated by the Court of Appeal in *Ganasan Marimuthu v. Public Services Commission & Anor* [1998] 4 CLJ 331 at p. 340.

> It is only if a committee of inquiry is appointed because the disciplinary authority requires further clarification in the case against the officer (general order 26(5)), that he will have the opportunity to give oral testimony to exculpate himself (general order 26(6)). It is only then that the committee has the discretion to allow him to be represented by an officer of the public service, in exceptional cases, by an advocate and solicitor (general order 26(8)).

[20] There is thus, no miscarriage of justice in this case as the applicant had been given the right to make a written representation in answer to the charge levelled against him. In the case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525 it was decided that the right of hearing does not mean the right to an oral hearing only. A right to make written representation would suffice to comply with the principles of natural justice and this was also held in *Ganasan*'s case *(supra)*.

The Issue Of Delay

[21] Considering the date when the applicant made his written representation in answer to the Commission's letter ie, 20 October 2008 and the 3rd respondent's Board of Investigation hearing held on 30 January 2009, the delay complained of here was just slightly more than a year (to the date of the letter of termination on 3 December 2009). During that period there was no evidence as to what officially had been done to the applicant – whether he was interdicted or suspended pending the decision by the Commission, for instance. He was basically left in a limbo but that could not be a fault of the respondents or particularly, the 3rd respondent because in his own affidavit, the applicant himself admitted that due to his tiff and unhappiness with Mdm Peggy Ronin, he walked out and refused to go back to work "until this matter is resolved" (see para. 19 of his affidavit in support).

[22] The Federal Court in *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573, affirming the decision of the Court of Appeal in the same case held that in disciplinary proceedings such as this, whether there is unreasonable delay would depend on the circumstances of each case and delay *per se* cannot be construed against the Commission. YAA Tan Sri Zaki Tun Azmi PCA (As His Lordship then was) held that long

A delay may, when coupled with some other circumstances, amount to strong evidence of condonation on the part of the employer of the employee's misconduct. The General Orders applicable to federal officers of the Federal Government as like the General Orders affecting the state officers in this case do not provide for
B a time when disciplinary action must be taken. In this case, it was not so much the delay in taking action but the length of time it took for the 1st respondent to come out with their decision. The question I must ask myself is whether taking a year to make that decision has resulted in procedural unfairness in the disciplinary
C action taken against the applicant. I think it does not even when no reason was advanced on behalf of the 1st respondent why they took one year to deliberate on its decision.

[23] It must be remembered that the applicant himself chose not
D to go work. In this period of so called delay it is not shown how his position is adversely affected by it and at any rate, I do not see one year as being an inordinately long time. The delay also cannot be construed as condonation by his employer, the 2nd respondent of his absence from work for it was not their call but
E the 1st respondent's.

[24] Delay said His Lordship in *Vickneswary*'s case *(supra)* causes anxiety and in some circumstances may cause injustice and I think the court is only bound to act if injustice is caused and not
F otherwise.

[25] Just to recapitulate and by way of conclusion, I would affirm the decision of the 1st respondent in dismissing the applicant for his absence from work from 3 December 2007 until 14 February 2008 but would agree that his salary had been unfairly stopped
G for the months of October and November 2007. I order that he should be paid his salary for the two months but the one for November 2007 it is to be deducted pro rata for the days in the said month for which he is absent from work with interest at 8% per annum from October 2007 until full and final payment.

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[26] In other words, this application is only allowed in part, *albeit*, a very small part and in view of the dismissal in respect of the majority of the reliefs he claimed, two-third (2/3) costs is awarded to the respondents to be taxed unless agreed.

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